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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel.,
RANDY CARVER,

No. 10-02529 CW

Plaintiff,

ORDER GRANTING
DEFENDANT FACTOR
NUTRITION LABS,
LLC'S MOTION TO
DISMISS

(Docket No. 34)

v.

FACTOR NUTRITION LABS, LLC; VITAL
BASICS, INC.; and WALGREEN CO.,

Defendants.

/

In this qui tam action, Plaintiff Randy Carver, on behalf of himself and the United States, charges Defendant Factor Nutrition Labs, LLC, with false patent marking. Factor Nutrition moves to dismiss Plaintiff's action. Plaintiff opposes Factor Nutrition's motion. The United States has not intervened or otherwise appeared in this action. The motion was taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS Factor Nutrition's motion.

BACKGROUND

The following allegations are contained in Plaintiff's First Amended Complaint (1AC).

Factor Nutrition owns, manufactures, advertises and distributes the FOCUSfactor brand of memory supplements. To advertise the products, Factor Nutrition enlists "a great number of

1 affiliate marketers to drive internet traffic" to Factor
2 Nutrition's FOCUSfactor website. 1AC ¶ 18. On their websites, the
3 affiliates, using similar language, claim that FOCUSfactor is
4 superior to competing products because it is patented. Plaintiff
5 has "independently confirmed" with three affiliates that "the
6 manufacturer" provided the text regarding FOCUSfactor's patented
7 status. 1AC ¶ 23. However, FOCUSfactor is not patented.

8 Plaintiff pleads one claim of false patent marking, in
9 violation of 35 U.S.C. § 292(a). He seeks an injunction
10 prohibiting Factor Nutrition from engaging in future acts of false
11 patent marking. He also asks the Court to assess against Factor
12 Nutrition civil penalties proportional to "the total revenue and
13 gross profit derived from the sale of" FOCUSfactor. 1AC at 12:28-
14 13:1.

15 On August 16, 2010, the Clerk entered default against
16 Defendant Vital Basics, Inc. Plaintiff has not moved for default
17 judgment against Vital Basics, which Factor Nutrition claims was
18 dissolved on July 22, 2009. See Kinsel Decl. in Support of Factor
19 Nutrition Labs, LLC's Motion to Set Aside Entry of Default, Ex. A.

20 On September 20, 2010, Plaintiff voluntarily dismissed his
21 claims against Defendant Walgreen Co.

22 **LEGAL STANDARD**

23 A complaint must contain a "short and plain statement of the
24 claim showing that the pleader is entitled to relief." Fed. R.
25 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
26 claim is appropriate only when the complaint does not give the
27 defendant fair notice of a legally cognizable claim and the grounds
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1 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
2 (2007). In considering whether the complaint is sufficient to
3 state a claim, the court will take all material allegations as true
4 and construe them in the light most favorable to the plaintiff. NL
5 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
6 However, this principle is inapplicable to legal conclusions;
7 "threadbare recitals of the elements of a cause of action,
8 supported by mere conclusory statements," are not taken as true.
9 Ashcroft v. Iqbal, ____ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
10 (citing Twombly, 550 U.S. at 555).

11 When granting a motion to dismiss, the court is generally
12 required to grant the plaintiff leave to amend, even if no request
13 to amend the pleading was made, unless amendment would be futile.
14 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
15 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
16 would be futile, the court examines whether the complaint could be
17 amended to cure the defect requiring dismissal "without
18 contradicting any of the allegations of [the] original complaint."
19 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
20 Leave to amend should be liberally granted, but an amended
21 complaint cannot allege facts inconsistent with the challenged
22 pleading. Id. at 296-97.

23 DISCUSSION

24 In relevant part, the false marking statute provides, "Whoever
25 . . . uses in advertising in connection with any unpatented
26 article, the word 'patent' . . . for the purpose of deceiving the
27 public . . . [s]hall be fined not more than \$500 for every such

1 offense." 35 U.S.C. § 292(a). The "false marking statute is a
2 criminal one, despite being punishable only with a civil fine."
3 Pequignot v. Solo Cup Co., 608 F.3d 1356, 1363 (Fed. Cir. 2010);
4 accord U.S. Gypsum Co. v. Pac. Award Metals, Inc., 438 F. Supp. 2d
5 1101, 1105 n.3 (N.D. Cal. 2006) (citing Mayview Corp. v. Rodstein,
6 620 F.2d 1347, 1359 (9th Cir. 1980)). "Any person may sue for the
7 penalty, in which event one-half shall go to the person suing and
8 the other to the use of the United States." 35 U.S.C. § 292(b).

9 Because claims for false marking require proof of intent to
10 deceive the public, courts have concluded that such claims sound in
11 fraud and are subject to the heightened pleading requirement of
12 Federal Rule of Civil Procedure 9(b). See, e.g., United States ex
13 rel. Hallstrom v. Aqua Flora, Inc., 2010 WL 4054243, at *5 (E.D.
14 Cal.); Shizzle Pop, LLC v. Wham-O, Inc., 2010 WL 3063066, at *4
15 (C.D. Cal.); Juniper Networks v. Shipley, 2009 WL 1381873, at *4
16 (N.D. Cal.). Rule 9(b) requires that, in "all averments of fraud
17 or mistake, the circumstances constituting fraud or mistake shall
18 be stated with particularity." "Malice, intent, knowledge, and
19 other conditions of a person's mind may be alleged generally."
20 Fed. R. Civ. P. 9(b). Allegations subject to Rule 9(b) must state
21 the "the who, what, when, where, and how of the misconduct
22 charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th
23 Cir. 2003) (citation omitted). The purpose of Rule 9(b) is to
24 "give defendants notice of the particular misconduct which is
25 alleged to constitute the fraud charged so that they can defend
26 against the charge and not just deny that they have done anything
27 wrong." Semeugen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

1 Allegations of fraud based on information and belief usually do not
2 satisfy the particularity requirements of Rule 9(b); however, as to
3 matters peculiarly within the opposing party's knowledge,
4 allegations based on information and belief may satisfy Rule 9(b)
5 if they also state the facts upon which the belief is founded.
6 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.
7 1987).

8 Factor Nutrition argues that Plaintiff's claim attempts to
9 hold it criminally liable for the acts of third parties. However,
10 nothing in the false marking statute precludes liability on the
11 part of defendants that advertise through other individuals or
12 entities. Factor Nutrition does not identify any language
13 restricting liability to those defendants that personally
14 disseminate false advertising about an article's patent protection.
15 Plaintiff alleges that, for advertising purposes, Factor Nutrition
16 provided affiliates with false information that FOCUSfactor was
17 patented and did so with intent to mislead the public. In other
18 words, Factor Nutrition, with ill intent, falsely advertised
19 through third parties that FOCUSfactor was patented. This theory
20 of liability does not fail as a matter of law.

21 Factor Nutrition also asserts that Plaintiff's claim must fail
22 because its website truthfully represents that FOCUSfactor has a
23 patent pending. Factor Nutrition notes that Plaintiff alleges that
24 its affiliates' only role is to "drive internet traffic to" its
25 website. Plaintiff does not allege that Factor Nutrition's
26 affiliates independently sell and distribute FOCUSfactor. Thus,
27 Factor Nutrition asserts, even if its affiliates' websites falsely
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1 represent that FOCUSfactor is patented, its website corrects their
2 alleged misstatements. However, evidence of Factor Nutrition's
3 website is not currently before the Court, and Plaintiff's
4 complaint and documents attached thereto do not suggest that the
5 website definitively cures any misrepresentation made by the
6 affiliates. Although the "bar for proving deceptive intent . . .
7 is particularly high," Pequignot, 608 F.3d at 1363, Factor
8 Nutrition has not established that, as a matter of law, Plaintiff
9 is unable to meet his burden.

10 Although Plaintiff's theory of liability is not legally
11 defective, he has failed to plead sufficient facts to support it as
12 required under Rule 9(b). Plaintiff does not plead how the alleged
13 fraud operated or any facts regarding Factor Nutrition's
14 relationship with its so-called affiliates. He does not allege
15 that Factor Nutrition deceived them or exercised control over them.
16 In contrast, he alleges that former Defendant Walgreen Co.
17 "independently advertises the product in media over which it has
18 exclusive control." 1AC ¶ 18. Further, Plaintiff fails to plead
19 the identities of the three affiliate marketers that stated that
20 "the manufacturer" supplied them with the challenged text. 1AC
21 ¶ 23. Plaintiff does not even allege that Factor Nutrition is "the
22 manufacturer" to which these marketers referred.

23 Plaintiff also does not aver under what circumstances Factor
24 Nutrition supplied the text to its affiliates, such as who provided
25 the text and when the proffer was made. He argues in his complaint
26 that "it stands to reason that at some point the manufacturer
27 provided approved advertising text to its affiliate marketers."

1 1AC ¶ 23. The fact that the affiliates employed similar language
2 supports a reasonable inference that the language originated from a
3 common source; it does not necessarily follow, however, that Factor
4 Nutrition was that source. Plaintiff must offer specific factual
5 allegations to support his claim, not speculation based on
6 argument.

7 Plaintiff's allegations fail to give Factor Nutrition
8 sufficient notice of the alleged fraud. Accordingly, his complaint
9 is dismissed with leave to amend to plead his false marking claim
10 with sufficient specificity. In particular, he must plead facts
11 explaining how the purported fraud operated; Factor Nutrition's
12 relationship with its affiliates; whether Factor Nutrition was "the
13 manufacturer" to which three of its affiliates referred; and the
14 circumstances under which Factor Nutrition supplied the copy for
15 the false advertising, that is, who at Factor Nutrition said what
16 to whom and when.

17 CONCLUSION

18 For the foregoing reasons, Factor Nutrition's motion to
19 dismiss is GRANTED. (Docket No. 34.) The Court dismisses
20 Plaintiff's complaint because it fails to comply with Rule 9(b).
21 Plaintiff is granted leave to amend to cure the deficiencies
22 identified above. Plaintiff may file an amended complaint within
23 seven days of the date of this Order. Within fourteen days of the
24 date the amended pleading is filed, Defendant shall file its answer
25 or a motion to dismiss. If a motion to dismiss is filed, Plaintiff
26 shall file his opposition fourteen days thereafter. Defendant's
27 reply shall be due seven days after that. The motion will be taken
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1 under submission on the papers. Defendant shall not re-assert the
2 arguments the Court rejected above.

3 IT IS SO ORDERED.

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5 Dated: 12/7/2010

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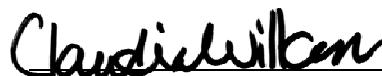
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CLAUDIA WILKEN

United States District Judge